No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

Petition for Review of a Decision of the National Labor Relations Board

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PETITIONER CROSS-RESPONDENT'S MOTION TO RECALL AND STAY THE MANDATE

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Macy's, Incorporated v. National Labor Relations Board, No. 15-60022

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Petitioner Cross-Respondent

1. Macy's Incorporated. Macy's, Inc. hereby discloses that it is a publicly traded corporation. Macy's, Inc. further discloses that no publicly held corporation owns 10% or more of its stock, and that it does not have a parent corporation. Macy's, Inc. owns 100% of the stock of Macy's Retail Holdings, Inc., which owns the store at issue in this litigation.

Respondent Cross-Petitioner

1. National Labor Relations Board

Intervenor

1. Local 1445, United Food and Commercial Workers International Union

Amici

1. Retail Litigation Center, Inc.
2. National Retail Federation
3. Coalition for a Democratic Workplace
4. Chamber of Commerce of the United States of America

5. International Foodservice Distributors Association

6. National Association of Manufacturers

7. National Association of Wholesaler-Distributors

8. National Federation of Independent Business

9. Society for Human Resource Management

10. National Restaurant Association

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

Petitioner Cross Respondent Macy's, Inc. ("Macy's") respectfully requests that this Court recall and stay its mandate in the above-captioned case. This Court entered judgment on June 2, 2016, and Macy's filed a timely petition for rehearing en banc on July 18, 2016. Over the dissent of six judges, this Court denied that petition on November 18, 2016. *Macy's, Inc. v. NLRB*, No. 15-60022, 2016 WL 6832944, at *1 (5th Cir. Nov. 18, 2016) (Jolly, J., dissenting). The mandate issued that same day. *See* Fed. R. App. P. 41 (stating that the mandate should issue "7 days after an order denying a timely . . . petition for rehearing en banc" unless the court "shorten[s] or extend[s] the time").

The very next business day, the U.S. Court of Appeals for the Second Circuit filed an opinion in a case involving materially identically legal issues, *Constellation Brands, U.S. Operations, Inc. v. NLRB*, No. 15-2442, 2016 WL 6832936 (2d Cir. Nov. 21, 2016), *granting* the employer's petition for review and adopting the same reasoning espoused by the *Macy's* dissent. In light of this resulting split in authority, Macy's intends to file a petition for a writ of certiorari, Sup. Ct. R. 13(1), and this Court should reconsider its denial of rehearing. These highly unusual circumstances—where a sister circuit issued a decision that conflicts with this Court's opinion mere days after the mandate issued—make recall of the mandate appropriate to prevent possible injustice. *See* 5th Cir. R. 41.2

Accordingly, Macy's asks this Court to recall its mandate and issue a 90-day stay. Fed. R. App. P. 41(d)(2)(A), (B). Such action would allow this Court to

reconsider its denial of rehearing and afford Macy's the opportunity to file its petition for certiorari. Upon official notification that a certiorari petition has been filed, Macy's further requests a continuance of the stay until final disposition of that petition.[1] *See id.*

ARGUMENT

I. THE MANDATE SHOULD BE RECALLED TO PREVENT INJUSTICE

This Court will recall its mandate when "unusual circumstances" and "the interest of fairness" suggest that such action would "prevent possible injustice." *Estate of Lisle v. C.I.R.*, 431 F.3d 439, 439 (5th Cir. 2005); 5th Cir. R. 41.2 ("Once issued a mandate will not be recalled except to prevent injustice."). Those circumstances include situations in which intervening judicial authority has called this Court's decision into question. *E.g.*, *United States v. Fraga-Araigo*, 281 F.3d 1278 (5th Cir. 2001) (unpublished) (recalling mandate in light of subsequent decision from this Court); *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) (stating that it is appropriate to recall the mandate "when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong"); *Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir. 1942) (recalling mandate to avoid injustice due to intracircuit conflict); *see also* Wright & Miller, 16 Federal Practice & Procedure § 3938 (3d ed.) (indicating that

[1] Before filing this motion, counsel for Macy's consulted with counsel for the National Labor Relations Board ("NLRB" or the "Board") and Local 1445, United Food and Commercial Workers Union (the "Union"), who indicated that both the NLRB and the Union would oppose this Motion. 5th Cir. R. 27.4.

courts have recalled the mandate where "new law [is] made shortly after the decision"). Injustice can also arise "'where there is a danger of incongruent results in cases pending at the same time,'" *Tolliver*, 116 F.3d at 123 (citation omitted), including cases pending outside the Fifth Circuit, *e.g.*, *Lisle*, 431 F.3d at 439-40.

Here, intervening authority from the Second Circuit called this Court's decision into question just days after the denial of rehearing en banc. The result is that the circuits are now divided on whether the NLRB must explain the *legal* significance of *factual* distinctions between included and excluded employees before unionizing a subset of an employer's integrated workforce. *See infra* Part II.A.1(a) (describing the split). While the Second Circuit has held that step one of the test set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011) requires the NLRB to "explain *why* excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with [included employees,]" *Constellation*, 2016 WL 6832936, at *8, this Court has permitted the NLRB to approve a bargaining unit without "rigorously weighing the community of interest factors by comparing the employees in a petitioned-for unit with employees outside that unit," *Macy's*, 2016 WL 6832944, at *5 (Jolly, J., dissenting).

The Second Circuit's decision creates the very real possibility of "incongruent results" in cases presenting materially identically legal issues that are pending at the same time. This Court should therefore recall its mandate to consider a stay (or reconsider its denial of rehearing) while Macy's asks the Supreme Court to reconcile

these competing lines of authority. *Cf. Lisle*, 431 F.3d at 439-40 (recalling the mandate and amending decision so that litigants before this Court would be entitled to the same standard on remand that was applied by the Eleventh Circuit); *Am. Iron & Steel Inst. v. E.P.A.*, 560 F.2d 589, 598 (3d Cir. 1977) (recalling and amending mandate to conform to the law in other circuits). Absent such relief, both Macy's and the Union could be required to expend valuable resources engaged in bargaining negotiations that may prove unnecessary if the Supreme Court intervenes. *See infra* Part II.B.

Accordingly, in these unusual circumstances, the interests of fairness counsel strongly in favor of recalling the mandate.

II. MACY'S IS ENTITLED TO A STAY OF THE MANDATE

Once the mandate is recalled, this Court should stay its issuance while Macy's seeks relief from the Supreme Court. This Court will order such a stay when a "certiorari petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Macy's meets both prongs of this test. Macy's contemplated petition would present a substantial question that has divided the courts of appeals, namely, whether the NLRB must explain the *legal* significance of *factual* distinctions between included and excluded employees before unionizing a subset of an employer's integrated workforce. As noted above, the Second Circuit has split from this Court on that question. Macy's may also challenge the *Specialty Healthcare* framework itself, the propriety of which has been the subject of extensive litigation in recent years.

Moreover, there is good cause for a stay. Without such relief, Macy's may be compelled to bargain with the Union before the Supreme Court ultimately rules on the propriety of the petitioned-for unit. As courts have concluded in bargaining and other contexts, parties should not be forced to reorder their affairs while the process of judicial review is ongoing.

A. Macy's Certiorari Petition Will Present a Substantial Question.

The "substantial question" standard is not onerous. It does not require courts to conclude that the applicant is likely to succeed on the merits. Instead, "the applicant must show a reasonable probability that four justices will vote to grant certiorari and a reasonable possibility or 'fair prospect' that five justices will vote to reverse the circuit court's judgment." 20A Moore's Federal Practice - Civil § 341.14[2]; *see also Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (same); *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (same); *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983) (stating that a court need only identify "'a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari'" and "'a significant possibility of reversal'" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983)). As the Supreme Court has explained in describing a similar standard:

> [The applicant] need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 n.4 (internal quotation marks and alterations omitted).

Thus, for example, in *Atlas Global Grp., L.P. v. Grupo Dataflux*, 312 F.3d 168, 170 (5th Cir. 2002), this Court held that a party's post-filing change in citizenship could cure a lack of subject-matter jurisdiction that existed at the time the action was filed. The panel nonetheless stayed its mandate, even though it had rejected the applicant's claims and presumably believed the Supreme Court would as well. *See* Order, *Atlas Global Grp., L.P. v. Grupo Dataflux*, No. 01-20245 (5th Cir. Mar. 25, 2003). The Supreme Court later reversed, demonstrating the wisdom of the stay. *See Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567 (2004). Indeed, Courts have issued stays even where the applicant "presents a weak case for a grant of certiorari." *Books*, 239 F.3d at 829; *see also, e.g.*, *United States ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 450 (7th Cir. 2002) (staying mandate where "the possibility of the Supreme Court's granting certiorari in this or another case raising the issue is not entirely insubstantial").

Here, Macy's case for certiorari is strong, and reversal is likely—as shown by the thoughtful opinion of Judge Jolly, joined by Judges Jones, Smith, Clement, Owen, and Elrod, dissenting from the denial of rehearing en banc. *Macy's*, 2016 WL 6832944, at *1 (Jolly, J., dissenting). The respectful disagreement among the jurists of this Court illustrates that the underlying questions are at least substantial, and that there is at least a reasonable possibility that the Supreme Court will side with the dissenters.

1. There Is a Reasonable Probability of Supreme Court Review.

(a) There Is a Conflict Among the Circuit Courts on the Important Matters Raised in This Case.

A split among the federal courts of appeals is among the most important factors in determining whether certiorari will be granted. Sup. Ct. R. 10(a); Shapiro, et al., *Supreme Court Practice* § 4.3, at 241-43 (10th ed. 2013). Here, the existence of a split is beyond dispute.

As noted above, immediately after this Court denied Macy's petition for rehearing en banc, the Second Circuit issued a unanimous opinion in a case raising materially identical legal issues (presented, even, by the same lawyers). *See Constellation*, 2016 WL 6832936. Like *Macy's*, *Constellation* involved an effort to unionize a subset of an employer's integrated workforce—the "outside cellar" employees at a single Constellation winery, much like the cosmetics and fragrances employees at a single Macy's department store. *See id.* at *2. Unlike *Macy's*, however, the Second Circuit *granted* the employer's petition for review. *See id.* at *8. In doing so, the court held that when applying the community of interest factors at step one of the *Specialty Healthcare* framework, the Board "must *analyze* . . . the facts presented to: (a) identify shared interests among members of the petitioned-for unit, *and* (b) explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Id.* at *7. In other words, the Second Circuit concluded that"[m]erely recording similarities or differences

between employees does not substitute for an explanation of *how* and *why* these collective-bargaining interests are relevant and support the conclusion." *Id.* (emphases added). "Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation and to avoid making step one of the *Specialty Healthcare* framework a mere rubber stamp." *Id.*

This holding squarely conflicts with this Court's determination in *Macy's*. As the six dissenters observed, the same error the Second Circuit condemned in *Constellation* infects the NLRB's determination in *Macy's*: the NLRB applied "an incorrect standard for analyzing the first prong of the *Specialty Healthcare* framework" by failing "to compare employees in the petitioned-for group with excluded employees." *Macy's*, 2016 WL 6832944, at *2, *4 (Jolly, J., dissenting). Here, "[t]he NLRB discussed similarities between employees within the petitioned-for group, but it did not discuss similarities between included employees and the excluded employees." And crucially, while it pointed to *factual* distinctions between included and excluded employees, it "did not explain how th[ose] distinction[s] w[ere] meaningful." *Id.* at *5; *see also id.* (stating that "the NLRB did not explain why this purported difference had contextual substance or was not 'meager'").

Ultimately, in both cases, the NLRB failed to "weigh[] the community of interest factors and explain[] *why* the differences between [included] employees and [excluded] employees outweighed the similarities." *Id.* at *7 (emphasis added). In

response, this Court denied the employer's petition for review, while the Second Circuit granted the petition for review. The resulting split in authority creates a reasonable probability that Macy's petition for certiorari will be granted.

(b) Macy's Petition Will Raise Important Questions of Federal Law That Have Not Been, but Should Be, Squarely Decided by the Supreme Court.

The Supreme Court also grants certiorari when a court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). "The importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue." Shapiro, *supra*, § 4.11, at 263. Here, the issues presented by a potential certiorari petition—the interpretation and legality of the Board's *Specialty Healthcare* standard—more than satisfy the "important question" standard.

Indeed, the significance of these issues is illustrated by the spate of recent cases challenging the Board's adoption and application of *Specialty Healthcare*. *E.g.*, *Constellation*, 2016 WL 6832936; *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016). Industry groups and associations have been regular participants in these proceedings, even taking the unusual step of filing briefs in support of rehearing en banc. *See, e.g.*, Retail Ass'ns Amicus Br.; Chamber Amicus Br.; HR Policy Amicus Br.; *see also Constellation*, 2016 WL 6832936, at *5 (citing Brief for Amici Curiae Coalition for a Democratic Workplace, Chamber

of Commerce of the United States of America, National Retail Federation, and Retail Litigation Center, Inc.).

The implications of the panel's decision for Macy's itself shows why employers are so concerned about this issue. Under the panel's reasoning, in one store alone, Macy's could now be forced to bargain with up to eleven unions, should other sales departments unionize. Nationwide, Macy's operates over 800 stores, and thus could be compelled to bargain with upwards of 8,000 units across the country if each department organizes separately. Macy's and other employers could face countless obligations within a single store or facility, as different unions lobby for different hours, wages, or benefits. These competing demands, as well as the potential for successive strikes by different unions in the same store, could render Macy's business model impractical. Meanwhile, employees could find their bargaining power curtailed due to the proliferation of competing unions, and their right to "refrain" from collective bargaining rendered illusory by gerrymandered units.

Moreover, as the six dissenters observed, this case "presents another example of the current National Labor Relations Board's . . . determination to disregard established principles of labor law." *Macy's*, 2016 WL 6832944, at *2, *4 (Jolly, J., dissenting). In recent years, the Supreme Court has not hesitated to intervene when an agency has overstepped its bounds, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), and there is thus every reason to think that it may take similar steps in this case.

2. There Is a Reasonable Possibility of Reversal.

There is also a reasonable possibility that five Justices will conclude that this Court's decision merits reversal. Indeed, that is exactly what six judges of this Court concluded in dissenting from the denial of rehearing en banc, *Macy's*, 2016 WL 6832944, at *5 (Jolly, J., dissenting). For the reasons discussed below, there is a "fair prospect" that the Supreme Court will side with those judges.

First, the Supreme Court has held that an agency exercising delegated authority "must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442-43 (1965); 5 U.S.C. § 557. Such explanations are necessary to ensure meaningful judicial review, particularly where "an agency is applying a multi-factor test through case-by-case adjudication," *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

"This general principle of administrative law is fully applicable to unit determinations." *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984). Indeed, multi-factor tests such as the community-of-interest analysis can "lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen*, 357 F.3d at 61. Otherwise, "the 'totality of the circumstances' can become simply a cloak for agency whim," *id.*, allowing the Board to recite "differences

when the union desires exclusion of employees" and "similarities when the union desires inclusion." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995).

That is exactly what the Board did here. Rather than explaining why or how purported factual distinctions pertain to "the purposes of collective bargaining," 29 U.S.C. § 159(b), the Board incants those distinctions repeatedly as though their "weight or significance" were self-evident. *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980). The result was a Board decision that reads like "'a bad law school exam,'" *Macy's*, 2016 WL 6832944, at *2 (Jolly, J., dissenting), and that lacks reasoning "sufficiently articulated to permit proper judicial review." *Purnell's Pride*, 609 F.2d at 1162. This failure, in and of itself, creates a fair prospect of reversal by the Supreme Court.

Second, the Supreme Court could also go so far as to invalidate the *Specialty Healthcare* framework itself. Congress tasked the Board with making unit determinations "in each case," 29 U.S.C. § 159(b), without allowing "the extent to which the employees have organized" to be "controlling," *id.* § 159(c)(5). The Board may consider the extent of organization, but "this evidence should have little weight," H.R. Rep. No. 80-245, at 37.

Congress viewed § 159(c)(5) as essential to "assure full freedom to workers to choose, or to refuse, to bargain collectively, as they wish." *Id.* Affording controlling weight to the union's choice of unit undermines that freedom, because the union's overriding consideration is selecting a unit in which it can win a representation

election. Such deference to the union's hand-picked unit undermines both the right of dissenting employees within that unit to refrain from organizing, and the right of excluded employees to engage in collective bargaining. *See* 29 U.S.C. § 157.

Specialty Healthcare, however, *ensures* the union's choice of unit will have controlling weight. The panel claimed this test is permissible so long as the Board does not "presume" the propriety of the union-proposed unit. But *Specialty Healthcare* amounts to just such a presumption: the "Board will find" *any* group of employees that shares "a community of interest" to be an "appropriate unit" (so long as they are "readily identifiable" as a group). 357 N.L.R.B. at 945. Virtually any union-proposed group of employees—when viewed in isolation—has "employment conditions or interests 'in common.'" *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980). Thus, before *Specialty Healthcare*, the Board did not deem a unit appropriate without deciding "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Id.*

To be sure, after applying this de facto presumption, the Board considers whether the *employer* has shown the interests of excluded employees "overlap almost completely" with those of the petitioned-for unit. 357 N.L.R.B. at 943-45. But that is too little too late. At that point, the deck has already been stacked in favor of the union-proposed unit. It is this thumb on the scale in favor of the petitioned-for unit that effectively affords controlling weight to the union's choice of unit.

Moreover, the manner in which the Board applied *Specialty Healthcare* here illustrates that test's conflict with § 159(c). Rather than assessing the workforce as a whole, the Board looked first to the employees of the proposed unit, concluding that they shared common interests. *Macy's, Inc.*, 361 NLRB No. 4, 2014 WL 3613065, at *10-11 (July 22, 2014). This allowed the Board to ignore overwhelming similarities among all sales employees, and to justify a separate bargaining unit based on "meager differences" between sales employees in different departments. *Nestle*, 821 F.3d at 500. Considering cosmetics-and-fragrances sales employees "'solely and in isolation'" cannot be reconciled with § 159(c). *Id.* Accordingly, five Justices may well reverse this Court's judgment.

B. There Is Good Cause for a Stay to Preserve the Status Quo.

Macy's also meets the "good cause" prong of Rule 41(d)(2). Good cause is established based on the "equities in the case." Knibb, *Federal Court of Appeals Manual* § 34:13, at 924 (6th ed. 2013). A court must "balance the equities of granting a stay by assessing the harm to each party if a stay is granted," "tak[ing] into consideration the public interest." *Books*, 239 F.3d at 829; *see also* 20A Moore's Federal Practice - Civil § 341.14[2] (stating that the court should take both "irreparable injury" and the "public interest" into account).

First, a stay would relieve Macy's (and the Union) of the need to expend time and energy engaging in bargaining negotiations that may prove unnecessary if the Supreme Court intervenes. Bargaining is a complex, multi-faceted undertaking that

can be, and often is, protracted and costly. There is considerable potential for disruption throughout the process including, but not limited to, responding to burdensome demands for information, unfair labor practice charges, widespread publicity, and, of course, a strike or other forms of work stoppages. These risks are more likely to arise with an employer the size, scope, and nationwide profile of Macy's. *Supra* p. 10. Macy's should not be exposed to these and other risks given the compelling legal issues addressed by this motion and the possibility, if not the likelihood, that they will be resolved in the near future. Indeed, the same considerations that prevent the Board from enforcing its orders without judicial review apply with equal force here. In short, the parties should not be forced to negotiate and implement a bargaining agreement that may ultimately be obviated by a decree from a higher court. *E.g.*, Order, *Electrical Workers IBEW Local 36 v. NLRB*, No. 10-3448 (2d Cir. Feb. 8, 2013) (granting motion to stay the mandate when the underlying decision would have otherwise required the parties to engage in effects bargaining).

Second, for similar reasons, a stay is in the public interest. *Books*, 239 F.3d at 829. In *Books*, for example, the court found that a Ten Commandments monument on public property violated the Establishment Clause. *Id.* at 827. On remand, the government would have to formulate and implement a remedy. *Id.* The court found the "public interest is best served [by] affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention

to formulating and implementing a remedy." *Id.* at 829; *see also American Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990) (noting that a stay is warranted to ensure the parties do not have to "unscramble" their affairs until "the review process comes to a complete end"). Here too, the public interest is best served by allowing Macy's a full opportunity to seek Supreme Court review before scrambling the status quo.

CONCLUSION

For the forgoing reasons, Macy's respectfully requests that this Court recall and stay the mandate in this appeal.

Respectfully submitted, this the 8th day of December 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 8th day of December 2016, I caused a true and correct copy of the foregoing Motion to Recall and Stay the Mandate to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 3,986 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). It further satisfies any typeface limitations, as it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Garamond font.

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on December 8th 2016, this Motion to Recall and Stay the Mandate was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system. I further certify that; (1) required privacy redactions have been made pursuant to this Court's Rule 25.2.13, (2) the electronic submission is an exact copy of any required paper document pursuant to this Court's Rule 25.2.1, and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Shay Dvoretzky
Shay Dvoretzky